No. 10266.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

La Verne Co-Operative Citrus Association, a corporation, *et al.*,

Appellants,

vs.

United States of America,

Appellee.

APPELLANTS' REPLY BRIEF.

Guy Richards Crump,
535 Rowan Building, Los Angeles,
Attorney for Appellants.

Parker & Baird Company, Law Printers, Los Angeles

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Introductory Statement.

The quesion here before the Court is a simple one. Succinctly stated, it is:

Where a person is sued by the Government to restrain him from violating what purports to be the law, or, as here, what purports to be an order of an administrative agency, is there a *conclusive* presumption that the law or order is valid? In other words, can one be compelled to obey a so-called law or order which is *not in fact* a law or order and be relegated to so-called administrative remedies which may or may not ultimately afford him a declaration of his rights and the relief to which he is entitled?

If the Government is correct in its views, then no matter how far beyond its granted powers any administrative agency may go, those who are oriented by its action and

who meanwhile may lose their all thereby perchance may finally achieve a Phyrric victory—an intellectual accomplishment no doubt—but instead of bread find that they have only a stone.

I.

Answer to Appellee's Point I.

In the instant case we are dealing with Order No. 53 of the Secretary of Agriculture which controls and limits the shipments of lemons in interstate commerce.

Appellants having filed a petition with the Secretary of Agriculture under Section 8c (15) (A) of the Agricultural Marketing Act, seeking to be exempted from the operation of Order No. 53, and following a ruling by the Secretary denying and dismissing their petition, having filed in the United States District Court for the Southern District of California a bill in equity under and in accordance with the provisions of Section 8c (15) (B) of the Act, have exhausted their administrative remedies in so far as they have been able to do so. The cases on appeal were not of their seeking. They did not come into court asking for relief by way of injunction or otherwise against the enforcement of the order, but were brought in unwillingly as defendants. It follows that cases holding that one affected by, and complaining of, an administrative order, must first exhaust his administrative remedies before seeking relief in the courts, have no application. Appellants have not contended, and do not contend, that in the instant cases "all questions pertaining to the order" may be considered. (See Appellee's Br. p. 13.) We concede for the purposes of this case, that in the enforcement cases the Court starts with the order issued after the Promulgation Hearing, to wit, Order No. 53, and that all questions rela-

tive to procedural matters, including due process, in so far as due process has to do with procedure before the Secretary of Agriculture, must be determined in the review proceedings under Sections 8c (15) (A) and (B) of the Act, and we have never made any assertion to the contrary. Hence, the cases cited in footnote 3, on pages 13 and 14 of Appellee's Brief, are not in point.

There is a marked difference between constitutional questions involving procedural matters and those which go to the validity of the order either on its face or in its application. The distinction is recognized in the following quotation from *United States v. Slobdkin,* 48 Fed. Supp. 913, cited on page 16 of Appellee's Brief. This was a proceeding by the United States against Slobdkin (and a companion case against Rottenberg Co. Inc., *et al.*) for alleged violations of the Emergency Price Control Act of 1942, Sec. 1 *et seq.,* 50 U. S. C. A. Appendix, Sec. 901 *et seq.* We quote from page 916 of 48 Federal Supplement:

> "In approaching this question it is important to distinguish two different types of asserted invalidity. A regulation might, in form or in substance, be invalid on its face; or, though fair on its face, it might be invalid because of the circumstances of its adoption or application. This distinction is familiar in the area of administrative law. Smith v. Cahoon, 283 U. S. 553, 562, 51 S. Ct. 582, 75 L. Ed. 1264; Lovell v. Griffin, 303 U. S. 444, 452, 453, 58 S. Ct. 666, 82 L. Ed. 949. Illustrative of the former type of invalidity would be a regulation establishing different prices for persons of white than for persons of black color; or a regulation which, though it recited compliance with the Act, in fact governed a subject, such as an income tax, obviously foreign to the Act.

> Illustrative of the latter type of invalidity would be a regulation fair on its face but adopted without whatever procedural formalities may be requisite; or a regulation establishing classifications which in view of the surrounding circumstances are arbitrary and capricious."

Appellee has not cited any decision holding that where, as here, the Government seeks to enforce what purports to be an order of the Department of Agriculture, or other governmental agency, and where, as here, the validity of such purported order is attacked, not only on the ground that it is discriminatory, but also "unjust, unreasonable and arbitrary" and violative of the Fifth Amendment (in that it deprives defendant of its property without due process of law, in the sense that the order in and of itself, both on its face and in its application, establishes classifications "which in view of the surrounding circumstances are arbitrary and capricious"), that such defendant is not entitled to introduce evidence in support of his defense, to have the Court pass upon the constitutionality of the order, or to findings of fact, in the absence of express statutory provisions depriving a court hearing such case of its powers in such respect.

That both in enforcement proceedings by way of injunction and in criminal proceedings to enforce penalties for violation, the District Courts have jurisdiction to pass on constitutional questions (other than those affecting its validity because of the circumstance of its adoption), unless prohibited from doing so by the statutory limitations, is argued with supporting cases in Appellants' Opening Brief. The Congress has recognized this general rule in

its enactment of the Emergency Price Control Act of 1942, Chapter 26, 56 Statutes 23, 31, U. S. C. A., Title 50, Appendix, Section 924(d). This act expressly provides that no court, federal, state, or territorial (other than the Emergency Court of Appeals created by the Act, and the Supreme Court of the United States) shall have jurisdiction or power to consider the validity of any regulation, order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act authorizing the issuance of regulations or orders, or making effective any price schedules or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision. We quote Section 924(d) in the Appendix to Title 50 U. S. C. A., in the appendix hereto.

The cases of *United States v. C. Thomas Stores*, 49 Fed. Supp. 111, and *Henderson v. Kimmell,* 47 Fed. Supp. 635, also cited on page 16 of Appellee's Brief, have to do with the same provisions of the Emergency Price Control Act of 1942. This Act was enacted by the Congress in the exercise of its war powers. The Agricultural Marketing Act was not. The Emergency Price Control Act of 1942 contains express prohibition against any court other than the Emergency Court of Appeals and the Supreme Court of the United States passing upon the validity of an order or regulation issued pursuant to that Act. The Agricultural Marketing Act contains no such prohibition. If, in the absence of an express prohibition against a District Court, in an enforcement proceeding, passing upon the constitutionality of an order of an administrative agency, the Court does not have such power, the insertion of a specific prohibition in the Emergency Price Control Act would have been unnecessary.

Appellee insists that appellants should have requested a *supersedeas* or temporary stay in the Section 8c (15) proceedings (Appellee's Br. p. 17) and that the failure to do so is fatal to the right to raise constitutional questions in the instant cases. It relies in this connection on the case of *Natural Gas Pipeline Co. v. Slattery,* 302 U. S. 300, 82 L. Ed. 276. The point is discussed in the opinion in that case, on page 281 of 82 L. Ed., 302 U. S., p. 309, where the Court says:

> "We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By Sections 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was 'improper, unreasonable or contrary to law.' Section 67 authorizes the commission at any time, upon proper notice and hearing, to 'rescind, alter or amend any . . . order or decision made by it.' We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. Porter v. Investors Syndicate, 286 U. S. 461, 470, 76 L. ed. 1226, 1231, 52 S. Ct. 617, 287 U. S. 346, 77 L. ed. 354, 53 S. Ct. 132."

It is interesting to note that the only authority cited for the quoted language is *Porter v. Investors Syndicate,* 286 U.S. 461, 470-71, 76 L. Ed. 1226, 1232, 53 S. Ct. 132,

also cited on page 30 of Appellants' Opening Brief, and sought to be distinguished on page 17 of Appellee's Brief.

We quote from the opinion in the *Porter* case (286 U. S., at pp. 470-471, 76 L. Ed., p. 1232):

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 454, 60 L. ed. 1084, 1098, 36 S. C. 637. But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. v. Kuykendall, 265 U. S. 196, 203, 204, 68 L. ed. 975, 980, 981, 44 S. C. 553) or the decisions of the state court interpreting the act (Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. ed. 659, 43 S. C. 353) precludes a *supersedeas* or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

We find no provision in the Agricultural Marketing Act which authorizes an application to the Secretary of Agriculture for a supersedeas or temporary stay. But if the Secretary may grant a stay, it would seem that his powers in that regard terminated with his ruling on the petition under Section 8c (15) (A). In the present cases a petition was filed with the Secretary praying for relief in the language of Section 8c (15) (A), and until the Secretary ruled on that petition there was, and could be, no reason for petitioners asking for a supersedeas. By the provisions of Section 8c (15) (B) the petitioners were required to file their bill in equity for a review in

the United States District Court within twenty days following the Secretary's ruling dismissing their petition. We konw of no procerure whereby an application could be made to the Secretary of Agriculture for a stay after he had ordered the petition dismissed, and if such an application had been made, the time for filing the bill in equity for review in the District Court would not have been enlarged. Hence, the petitioners might have been in the position of asking the Secretary to make an order granting a supersedeas with respect to a petition which he had already ordered dismissed, while at the same time seeking a review of that order in the District Court.

Neither do we find any provision in the Agricultural Marketing Act which requires an application for a supersedeas in the District Court in connection with the review proceedings as a prerequisite to challenging in enforcement proceedings the constitutionality of an order issued by the Secretary under that Act. We find nothing in *Natural Gas Pipeline Co. v. Slattery, supra,* or in any other case, which requires a person to ask for a supersedeas or temporary stay as a necessary prerequisite to challenging the validity of an order of the Secretary of Agriculture as a defense in enforcement proceedings, where, as here, the attack on the order is not based upon "the circumstances of its adoption."

Appellee asserts that "The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction here complained of." (Appellee's Br. p. 18.) This is equivalent to saying that the so-called administrative remedy of a supersedeas or temporary stay was not available to appellants. The gist of the argument is that appellants must obey an unconstitutional order (which if unconstitutional is not an order at all), unless they have asked, as an

administrative remedy, a supersedeas or temporary stay, which administrative remedy was not available to them. This doesn't make sense.

The District Court cases cited in footnote 3 on page 13 of Appellee's Brief, stem from *New York State Guernsey Breeders Co-Op. Inc. v. Wallace,* 28 Fed. Supp. 590 (N. D. 1939). That case holds (p. 592) that in review proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act, the District Court is not to conduct a trial *de novo,* and that the question whether a ruling of the Secretary is "in accordance with law" is to be determined on the record before him *"save as there may be an exception of constitutional right."* (Emphasis added.) The same exception applies with respect to enforcement proceedings.

Appellee insists (Appellee's Br. p. 14) that Section 8c (6) was designed for prompt enforcement and that the evidence and proceedings thereunder should be confined to the single question of violation. It says that this is the only reasonable construction of the Act and that any other "would put a premium on disobedience to law by rewarding violators of the order with a short cut to judicial determination of the issues they seek to raise." This begs the question, because if the order in question is unconstitutional, person who disobeys it is not disobeying any *law,* and hence, no premium is being put on disobedience to any *law* and no violator of an order is rewarded or furnished any short cut, except a short cut furnished by the Government in seeking to enforce what purports to be, but is not in fact, an order. The vice of the Government's argument is that it assumes throughout that the order is constitutional and must be held to be constitutional.

II.

Answer to Appellee's Point II.

The Government would have it that we are solely, or at least primarily, concerned with "discrimination" against appellants. This is not so. Discrimination is *only one of several grounds* upon which the order is attacked [see paragraphs XII and XIII of the affirmative answer in the *La Verne* case, R. 49-51]. Appellee admits that discriminatory regulations may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment (*Detroit Bank v. United States,* 63 S. Ct. 297, 301; 87 L. Ed. Adv. Op. No. 6, pp. 266, 271), but asserts that no such case is presented here (Appellee's Br. p. 27). It also asserts that Order No. 53 does not take plaintiffs' property without due process of law (Appellee's Br. p. 27 *et seq.*). In short, it undertakes to argue the merits of the cases in so far as special defenses are concerned, although the District Court expressly declined to pass on them.

In the absence of findings by the trial court, this Court cannot and will not examine the evidence and make its own findings thereon. It is for this reason that we said in Appellants' Opening Brief, at page 38:

> "No good purpose would be served by attempting an argument on the merits in these cases at this time, and we shall make none. But we direct attention to the fact that considerable evidence relating to the constitutional questions was introduced in the hearings before the Secretary, which was supplemented

by additional evidence offered and refused admission by the District Court in these cases."

An examination of the evidence by this Court would require not only its examination of the printed Transcript and Record, but also the examination *in extenso* of the record before the Secretary, which was offered in evidence by the Government and denied admission [R. 151-2].

Again, on page 18 of Appellee's Brief, it is said:

> "The circumstances of this case are not such as would justify a stay and the District Court so determined in issuing the injunction herein complained of."

This is to say that the District Court passed upon the merits of the case; that it went beyond a mere holding that the order was made and was violated, and held that "the circumstances of the case" did not justify a stay, *i.e.,* that the evidence did not establish the invalidity of Order No. 53. Certainly if the District Court so held, appellants were entitled to specific findings of fact from which the legal conclusion follows, and this Court is entitled to know upon what facts the trial court based its holding. The law in this respect is well stated in the recent case of *Securities and Exchange Commission v. Chenery Corporation,* Vol. 87, L. Ed. Adv. Op. (Feb. 1, 1943) No. 8, 411, at page 416:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court,

it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' Helvering v. Gowran, 302 U. S. 238, 245, 82 L. ed. 224, 229, 58 S. Ct. 154. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

See, also:

Hazeltine Corporation v. Crosley Corporation (C. C. A. 6—1942), 130 Fed. (2d) 344, 348-9;

Kendrick Coal Dock Co. v. Commissioner of Internal Revenue (C. C. A. 8), 29 Fed. (2d) 559, 564;

Hunter v. Scruggs Drug Store (C. C. A.—1940), 113 Fed. (2d) 971, 974;

Matton Oil Transfer Corp. v. Dynamic (C. C. A. 2—1941), 123 Fed. (2d) 999, and

Perry v. Baumann (C. C. A. 9—1941), 122 Fed. (2d) 409.

III.

The Evidence Is Insufficient to Sustain Finding of Fact Number XIII.

This point is discussed under heading II, on page 39 of Appellants' Opening Brief. Appellee does not deny that there is a complete absence of evidence to sustain the finding in the particulars referred to in our opening brief, but says that the allegation and finding that non-compliance was injurious to interstate commerce is surplusage and was so regarded by the court below (Appellee's Br. p. 8). This may have been the opinion of the trial court, but it nevertheless made the finding, and we are not content to rest on what the judge said during the course of the trial, and, hence, before the findings were prepared or signed.

Appellee cites *American Fruit Growers v. United States,* 105 Fed. (2d) 722, 725, as being in accord with its views. The opinion in that case does not support the assertion. The Government sued American Fruit Growers to restrain the violation of an order made by the Secretary of Agriculture, known as Prorate Order No. 111, fixing prorate bases for oranges for the week beginning August 14, 1938. Order No. 111 was an administrative order made pursuant to basic Order No. 2 of the Secretary of Agriculture. The validity of Order No. 2 was not attacked, but the validity of Order No. 111 was assailed by defendant on the ground that it was in conflict with the provisions of the Agricultural Marketing Act and the basic order issued pursuant thereto. The bill alleged "that

the effect of appellant's violation of the order 'has been to impair the effectiveness of the program inaugurated by the order regulating the handling of oranges * * * to disrupt and obstruct interstate commerce * * * to render partially ineffective the lawful regulation of such commerce, as provided in the act and order * * *."

Defendant alleged as separate defenses "that the bill failed to state facts sufficient to constitute a cause of suit, and that the prorate order was void because in conflict with the provisions of the Act and Order No. 2. The District Court granted an injunction *pendente lite* and defendant appealed. There does not appear to have been any question raised as to the sufficiency of the evidence to sustain findings of fact, nor of the necessity of findings with respect to the quoted allegations of the bill. It is true that this Court in its opinion said: "By 7 U. S. C. A. Section 608a (6) Congress authorized an injunction upon a showing of violation alone" (p. 725), but this was said with reference to the necessity of pleading facts showing irreparable injury, or that the United States had no adequate remedy at law and was limited to the violation of "a valid order." Of course, if the findings that the acts of appellants were or would be injurious to interstate commerce and to growers, handlers and consumers of lemons, or did or would threaten the stability of interstate or foreign commerce in lemons, or did or would tend to thwart the national policy of improving the marketing conditions in the handling of lemons in interstate commerce, or any of such findings, are surplusage, then it

would seem that the insufficiency of the evidence to sustain them would not be grounds for reversal, but by the same token these findings should not be binding upon appellants, or constitute *res judicata* in the review proceedings which are still pending, or in any other litigation.

Appellants are entitled to a definite holding that the findings in question are surplusage and not binding on them, on the one hand, or, in the alternative, to a reversal of the case for insufficiency of the evidence to sustain the findings.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorneys for Appellants.

APPENDIX.

EMERGENCY PRICE CONTROL ACT of 1942, Title 50 U. S. C. A., Appendix, Section 924(d):

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 (section 902 of this Appendix), of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.